NO. 84828-9

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM H. KIELY and SALLY CHAPIN-KIELY,
husband and wife,

Respondents,

vs.

KENNETH W. GRAVES and KAREN R. GRAVES, Trustees of the Graves Family Trust; and all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein,

Appellants.

STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT

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A. NATURE OF THE CASE AND DECISION

The appellants Kenneth W. Graves and Karen R. Graves, the trustees of the Graves Family Trust ("Graves"), seek direct review by this Court of the Jefferson County Superior Court's judgment entered on July 2, 2010.

The issue presented for review is: should a claim for adverse possession with respect to a platted alley dedicated forever to public use be barred by RCW 7.28.090 because the City of Port Townsend held a fee interest in the alley until its vacation in February 2009?[1]

The reasons for granting direct review are found in RAP 4.2(a)(3) and (4). The present case involves an issue in which the decision of the trial court conflicts with controlling decisions of this Court on the scope of adverse possession of publicly-owned property. Moreover, this case involves a fundamental and urgent issue of broad public importance which requires prompt and ultimate determination by this Court. Under the trial court's decision, municipalities could face claims of adverse possession with respect to streets and alleys dedicated in plats or easements for such public facilities in fee when municipal governments have not chosen to

[1] There are other issues in this case including whether the Kielys established all of the elements for adverse possession and the scope of the property subject to adverse possession, but the core issue in the case is whether adverse possession is possible in connection with the platted alley easement.

erect the alley or street for the myriad of reasons, including financial, that impact on such a discretionary decision.

(1) Factual Background

On or about March 18, 1908, John and Mary Power, recorded a plat creating the Power addition with the City of Port Townsend. The Power addition plat contained the following language:

> and we do hereby dedicate to the public for its use forever as public thoroughfares the streets and alleys as shown on this plat.

The plat described an alley of 15 feet running east to west along the northern border of the Power addition. The alley is located entirely within the Power addition in the City of Port Townsend, and denoted by lines designating it separately from lots on the plat.

Graves owns a historic home in Port Townsend purchased from Mr. Graves' parents' estate. Mr. Graves grew up in the home as a teenager. Graves also owns a lot in the Power addition that abuts the historic home ("Lot 10") also purchased from the estate of his parents. The Graves planted fruit trees and berry vines on Lot 10, wanting to maintain the lot as an open space. The alley forms the northern (more or less) border and boundary of the plat. The alley bisects the plat in the middle. The eastern (more or less) half of the alley has also been open and used as a public way. The western (more or less) half of the alley has

never been opened, though it is not physically closed off. Lot 10 abuts this western half of the alley.

In 2008, Graves filed a petition to vacate the western half of the alley. The petition was processed according to the statutes and ordinances for vacation. A survey was performed. The survey disclosed an encroachment of buildings (shed and cottage) approximately 15 inches into the western half of the alley at one point.

As part of the vacation process, Graves was required to sign an indemnity and hold harmless agreement to protect the City against claims for the encroachment and adverse possession. At no time did the City or Graves believe there was an adverse possession claim that extended beyond the 15 inches encroachment. The Graves did not have a lawyer.

In February 2009, the Port Townsend City Council passed street vacation ordinance 3005, approving Graves' petition to vacate the alley easement referenced in the 1908 plat. On enactment of the ordinance, Port Townsend conveyed the vacated alley to Graves through a lot line adjustment recorded on March 2, 2009.

The Kielys own blocks 7, 9, and 11 of the Winslow's addition which is located to the north of the Power addition in the City of Port Townsend. No part of the alley dedicated by Mr. and Mrs. Power ever belonged in the Winslow's addition. The Kiely property contains a

cottage that encroaches into the alley by approximately 15 inches at its deepest point of encroachment. Kiely property also has a shed that encroaches upon the eastern portion of the alley by approximately 8 ½ inches at its deepest point of encroachment.

Shortly after the enactment of the plot line adjustment in favor of Graves, making them record holders of title to the alley, the Kielys filed the present action alleging ownership of the alley through adverse possession. The trial court, the Honorable George Wood, denied the parties' motion for summary judgment on the applicability of RCW 7.28.090. After a bench trial before a visiting judge, the Honorable Craddock Verser, the trial court entered a judgment in favor of the Kielys as to the *entirety* of the alley.

(2) Legal Analysis Supporting Direct Review

RCW 7.28.090 states that adverse possession is not possible with respect to lands or tenements owned by the United States, the state, nor to school lands or lands held for any public purpose. Streets and alleys qualify as a public purpose subject to that statute. "There can be no rightful permanent private possession of a public street." *Town of West Seattle v. West Seattle Land and Improvement Company,* 38 Wash. 359, 364, 80 P. 549 (1905) (quoting *Elliot on Roads & Streets* (2ded.)) Moreover, a property does not lose its character as a public property

merely because no public funds are expended for the maintenance or upkeep of the public facility. *Goedecke v. Viking Inv. Corp.*, 70 Wn.2d 504, 509, 424 P.2d 307 (1964). It is well-established that a party may not claim adverse possession against a municipality with respect to property held by such municipality for public use. *Gustaveson v. Dwyer*, 83 Wash. 303, 304-06, 145 P. 458 (1915).[2]

After *Goedecke*, there is little question that the Kielys, as abutting property owners, could not acquire any part of the street or alley right of way, or the property over which the street or alley passed where a street or alley was actually constructed by adverse possession.

Thus, it is clear that, at a minimum, the trial court erred in concluding that adverse possession applied to the *entirety* of the alley property at issue here. Even if the trial court were correct that the only interest possessed by the City was an alley easement, adverse possession was legally precluded as to that interest under RCW 7.28.090 as to that interest. The ten year period for adverse possession under RCW 4.16.020 did not commence to run as to that alleged easement interest until the interest was vacated by operation of law. *Wells v. Miller*, 42 Wn. App. 94,

[2] However, if a municipality holds property in its proprietary capacity for a nonpublic purpose, it may be subject to an adverse possession claim. *Commercial Waterway District No. 1 of King Cy. v. Permanente Cement Co.*, 61 Wn.2d 509, 379 P.2d 178 (1963); *Sisson v. Koelle*, 10 Wn. App. 746, 520 P.2d 1380 (1974). There is no question in this case that the alley was dedicated to the City for a *public purpose.*

708 P.2d 1223 (1985). Port Townsend's interest remained intact through the vacation of the alley because the property of issue here lies entirely within the boundary of a city. RCW 36.87.090,[3] providing for automatic vacation of a platted street or alley if not opened within five years, does not apply. *Howell v. King County*, 16 Wn.2d 557, 558, 134 P.2d 80 (1943); *Leonard v. Pierce County*, 116 Wn. App. 60, 64, 65 P.3d 28 (2003) (". . . the non-user statute "vacates" *any county road* not opened for public use within years of the order or authority for opening it. But the statute's proviso exempts streets dedicated in a plat from such a non-user vacation.") (emphasis added). The statutory period for adverse possession thus commenced when the City vacated the alley and the Graves remain in possession, at a minimum, of the alley easement.

More critically, the trial court's decision relies upon a misapplication of Division II's decision in *Erickson Bushling, Inc. v. Manke Lumber Co.*, 77 Wn. App. 495, 891 P.2d 750 (1995). In that case,

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[3] RCW 36.87.090 states:

> Any county road, or part thereof, which remains unopen for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby vacated, and the authority for building it barred by lapse of time: PROVIDED, That this section shall not apply to any highway, road, street, alley, or other public place dedicated as such in any plat, whether the land included in such plat is within or without the limits of an incorporated city or town, or to any land conveyed to deed to the state or to any county, city or town for highways, roads, streets, alleys, or other public places.

a plat dedicated only an easement to a county for a public road but the road was unimproved by the county.

The court concluded that where land is dedicated to the public for a street or road, the public only acquires an easement, an equitable interest in the property, and the underlying fee remains in the adjacent property owners. *Id.* at 497-98. The plaintiff there did not seek to extinguish the County's easement, restrict public access to it, or interfere with the County's use of it. *Id.* at 499. The court thus approved of a cause of action for adverse possession as to the property of the servient estate.

But in this case, the trial court made no determination whatsoever regarding the nature of the original grant to the City in the Power addition plat. It simply *assumed* that the interest was an easement without any analysis whatsoever.

RCW 58.08.015 provides that

> Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents or purposes, as a quitclaim deed to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.

This statute requires that a court determine the grantor's intent in making the dedication; ordinarily, a quitclaim deed only conveys the interest

intended by a grantor. *Rainier Avenue Corp. v. City of Seattle*, 80 Wn.2d 362, 366, 494 P.2d 996 (1972). In fact, the plat's language, unaddressed by the trial court here, is "best evidence" of the grantor's intent. *Id.* at 366. Moreover, a court is not limited to those words alone and may consider lines and designations on the plat. *Id.*

In this case, the plat conveyed a fee interest to the City of Port Townsend as the property was "dedicated to the public for its use forever as public thoroughfares the streets and alleys *as shown on this plat.*" (emphasis added.) The duration and extent of the interest conveyed here was important. Moreover, the plat indicates that the ally was distinct from the Graves' Lot 10 in the Power addition. Even the Anderson survey for the lot line adjustment indicates the alley is a distinct property from Lot 10. The grantor conveyed its original fee interest in the strip to the city.

Thus, this trial court's decision is predicated upon a misapplication of the *Erickson Bushling* decision of the Court of Appeals, Division II, to the facts in the case. A road easement was specifically dedicated in *Erickson Bushling*. That is not true here where the grantor's intent was different.

Moreover, while Washington courts have adhered to the principle that a street dedication in a plat ordinarily conveys only an easement to the municipality, *Burmeister v. Howard*, 1 Wash. T. 207 (1867); *Rowe v.*

James, 71 Wash. 267, 128 Pac. 539 (1912); *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968); *Bushling-Erickson, supra;* this is by no means the universal rule. In other jurisdictions, the rule adopted by statute is that such a dedication conveys a fee interest to the municipality. *See* Annotation, "*Validity and Construction of Regulations as to Subdivision Maps or Plats*," 11 A.L.R. 2d 524 (1950) at § 6(b).

Direct review is appropriate in this case. RAP 4.2(a)(3).

Additionally, however, RAP 4.2(a)(4) is implicated by the trial court's decision. There are uncounted dedications of alleys and streets within plats within the boundaries of cities and towns in Washington that are not yet implemented. These dedications are for a critical public purpose—streets and alleys. In Alfred E. Donohue, *Unopened Public Street Easements in Washington; Whose Right to Use that Land Is It Anyway?* 76 Wash. L. Rev. 541, 541-42 (2001), the author offered a snapshot of just how significant unopened public street easements are in our state:

> Throughout Washington, public easements burden a significant amount of land. They give the city or county the right to construct a street at any time, but until the city or county actually does so, the land remains unused. For example, two Seattle neighborhoods, Magnolia and Queen Anne, have numerous unopened, unused, and unimproved public street easements. These easements total more than 21,000 linear feet in these two neighborhoods alone. This amounts to more than 650,000 square feet of unopened

> public street easements, or nearly fifteen acres of land in two of Seattle's most expensive neighborhoods.

The author also stated that "there are substantial dedicated but unopened and unused streets statewide." *Id.* at n.5.

Many plats contain language of dedication similar to the language at issue here. This Court should consider the scope of the property interest for streets and alleys dedicated in plats in order to appropriately apply the policy of RCW 7.28.090.

The trial court's decision, if allowed to stand, would result in the potential loss of those dedicated streets and alleys by municipalities to claims of adverse possession by neighboring property owners. Moreover, property owners abutting the dedication, believing that adverse possession does not affect the survient estates subject to the dedicated interest because of RCW 7.287.090, could face unsuspected claims of adverse possession. The result would have serious repercussions for virtually every city and town in Washington.

This Court should grant direct review in this case pursuant to RAP 4.2(a).

DATED this 9th day of August, 2010.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of the following document: Statement of Grounds for Direct Review by the Supreme Court in Supreme Court Cause No. 84828-9 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 9, 2010, at Tukwila, Washington.

Christine Jones

Christine Jones
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

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Attached for today's filing - No. 84828-9, Kiely v. Graves

Statement of Grounds for Direct Review by the Supreme Court.

Thank you,

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